

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

3 UNITED STATES OF AMERICA, }
4 Plaintiff, } Case No. 03 CR 90-16
5 -vs- }
6 STEPHEN SUSINKA, } Chicago, Illinois
Defendant. } January 20, 2009
1:13 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO

APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 03 CR 90, United States versus Stephen
3 Susinka.

4 MR. POPE: Good afternoon, your Honor. Patrick Pope,
5 Chris Hotaling and Meghan Morrissey on behalf of the United
6 States.

7 MR. WAGNER: Good afternoon, your Honor. Steven
8 Wagner and Jack Rimland on behalf of Stephen Susinka who's
9 present before the Court.

10 PROBATION OFFICER: Good afternoon, your Honor.
11 Christina Figueroa on behalf of Probation.

12 THE COURT: Thanks for being here. And Ms. Figueroa,
13 you can be seated.

14 Are both sides ready to proceed to sentencing?

15 MR. POPE: Yes, your Honor.

16 MR. WAGNER: Yes, Judge.

17 THE COURT: And have you had, Mr. Wagner, a full
18 opportunity to review the Presentence Investigation Report?

19 MR. WAGNER: I have had an opportunity on my own,
20 your Honor; and, if the next question is have I had an
21 opportunity to go over it with Mr. Susinka, I have done that
22 as well.

23 THE COURT: Okay. Are there any changes you wish to
24 make to the report?

25 MR. WAGNER: With regards to any of the educational

1 or background information, no, Judge.

2 THE COURT: Okay. Any on behalf of the government?

3 MR. POPE: None, your Honor.

4 THE COURT: And are there any other factual
5 objections you have in the report?

6 MR. WAGNER: Just one second, Judge.

7 THE COURT: Go ahead.

8 (Counsel and defendant conferring.)

9 MR. WAGNER: Your Honor, certainly with the Court's
10 indulgence and consideration for having allowed Mr. Susinka,
11 as well as a number of other defendants throughout the course
12 of this case for the years that we've been before the Court
13 specifically with regards to my client, Mr. Susinka, to have
14 allowed him to address the Court both verbally in court and
15 also with regards to written motions, which he's filed.

16 As the Court may, in fact, be aware, Mr. Susinka had
17 filed on his own behalf approximately an 87-page memorandum in
18 which --

19 THE COURT: I did receive it.

20 MR. WAGNER: -- he does take exception with some of
21 the factual points raised in the PSR. So, again, with the
22 Court's indulgence and your Honor's permission, Mr. Susinka
23 had asked me for the opportunity to ask you to allow him to
24 address those issues.

25 THE COURT: Okay. Mr. Susinka, you can proceed.

1 DEFENDANT SUSINKA: Yes, your Honor. Thank you.

2 MR. POPE: May I sit so I can take notes?

3 THE COURT: Yes, you may.

4 DEFENDANT SUSINKA: Just to be courteous of the
5 Court's time, I'm going to try to skip over some of the issues
6 I raised in my memorandum and bring up issues that I didn't
7 raise in my memorandum --

8 THE COURT: Okay.

9 DEFENDANT SUSINKA: -- but I may repeat some of the
10 issues in my memorandum that I think are the most important.

11 THE COURT: Okay.

12 DEFENDANT SUSINKA: But the first of my issues was
13 the base offense level on the racketeering guideline, and the
14 PSR calculation of my guideline under 2E1, that's the
15 underlying racketeering activity, but as an alternative to the
16 arguments that I raised in my sentencing memorandum, adding an
17 alternative argument that there is no underlying racketeering
18 activity because the focus of the racketeering conspiracy is
19 the agreement itself, not the racketeering activity. So I'm
20 saying that underlying racketeering activity doesn't apply.

21 Or else, in the alternative, that if the Court
22 chooses to apply the relevant conduct instead of the
23 underlying racketeering activity guidelines, then as raised in
24 my memorandum the Sixth Amendment applies to -- or
25 excuse me -- I mean the language of the relevant conduct

1 guideline that any -- any crime that is an element of the
2 offense, that is not an element of the offense cannot be taken
3 into account in adding up the base offense level.

4 So what I'm saying is that the murder on Robert Perez
5 and the narcotics conspiracy -- and the narcotics conspiracy
6 are issues that effectively raised my statutory maximum,
7 which, under the case law I've submitted in my memorandum, the
8 Court is barred from taking into consideration because of that
9 fact.

10 THE COURT: So if I accepted your position, the
11 maximum is what?

12 DEFENDANT SUSINKA: 20 years.

13 THE COURT: Uh-huh.

14 DEFENDANT SUSINKA: But my position is that -- well,
15 okay.

16 MR. POPE: Your Honor, there's no dispute regarding
17 that issue.

18 THE COURT: Right.

19 MR. POPE: Based on the jury's finding, the maximum
20 sentence that he can be subject to is 20 years, putting aside
21 the concurrent/consecutive issue.

22 DEFENDANT SUSINKA: But my issue is more with that,
23 what is and isn't allowed to be considered by the Court as the
24 Supreme Court has set forth, and I'll repeat the issue as I
25 raised in my memorandum about the Jones case, how the Jones

1 case is similar to my racketeering case and the likely
2 sentencing statute on the racketeering holds that my maximum
3 is 20 and can be increased to life, depending on the
4 racketeering activity.

5 So that's why the *Apprendi* issue was raised, and the
6 jury was sent to a second round of deliberations to deliberate
7 with those statutory aggravating factors. So I'm raising a
8 similar argument about that.

9 About the murder, I got the double jeopardy argument.
10 That depends on my 6th Amendment if you find that the Robert
11 Perez and the narcotics conspiracy are in fact elements and
12 you agree with my 6th Amendment argument, then double jeopardy
13 applies according to my theories.

14 Then my third argument regarding the Robert Perez
15 incident was that I was not part of the conspiracy, at least
16 on the day that the Robert Perez murder occurred, and that is
17 based on I cited case laws in my memorandum. I got the
18 *Valencia* case from the 5th Circuit. It was ruled on
19 November 2, 2006.

20 Then I got the -- and, well, the *Valencia* case had to
21 do with being part of a conspiracy subsequent to your 18th
22 birthday. That case stated that in order -- anything that was
23 pre your 18th birthday was not to be considered as part of the
24 conspiracy and you had to ratify your involvement with the
25 conspiracy subsequent to your 18th birthday.

1 And past that, because my assertion is that I wasn't
2 part of the conspiracy subsequent to my 18th birthday at least
3 on the date or the time that the Robert Perez murder happened,
4 and there was no evidence showing any association with anybody
5 before the Robert Perez murder subsequent to my 18th birthday,
6 that it cannot be calculated as relevant conduct.

7 And I believe the relevant conduct guidelines, if you
8 choose to apply the relevant conduct, it states in a footnote,
9 I'm not sure because I have no access to legal material
10 regarding the guidelines, so I'm pretty sure it says that you
11 cannot be foreseeable to an act that was committed before you
12 were a member of the conspiracy.

13 And I cited the *Westview* case in support of that.
14 That was an 11th Circuit case decided April 16, 2008 that said
15 that you cannot be held liable for acts that were committed
16 before you were part of the conspiracy.

17 And my last point of that argument is the
18 government's acquittal against me -- I mean for me on the
19 Robert Perez incident shows that I was not a part of the
20 conspiracy after my 18th birthday, at least at the time that
21 the Perez homicide was committed because that would have been
22 my first predicate act and the first piece of evidence towards
23 my agreement after my 18th birthday, and the jury explicitly
24 rejected that.

25 So that's my fourth argument, again going toward the

1 Robert Perez, is the 3553(a) factors. I got 3553(a)(6) about
2 the sentencing disparities and the explicit language in
3 3553(a)(6) states that it's to avoid unwarranted sentencing
4 disparities between defendants who have been found guilty of
5 the same conduct with similar backgrounds.

6 But, I mean, that's not an exact quote, but I know
7 for sure the "found guilty" language is explicitly reflected
8 in the 3553(a)(6), and that's what I'm focusing on is what
9 I've been found guilty. So I'm saying that today in
10 considering my sentencing that you will consider facts that I
11 have been found guilty of based on the statute 3553(a).

12 And going more towards the acquitted column, shifting
13 from the factual issues to, like, the acquitted conduct issue
14 about the *Watts* case. The *Watts* discusses the acquitted
15 conduct, but the *Watts* in my opinion the way I understand the
16 case, it seems to carve out an exception towards special
17 findings of the jury because that case they said that unless
18 there are special findings of a jury, there's no way to
19 basically to know exactly, like, what a jury rejected and did
20 not reject. And in this case, there were special findings,
21 and the jury explicitly rejected that I was responsible for
22 the homicide of Robert Perez.

23 Again, it's not a general verdict, that the *Watts*
24 case addresses that just because there was a general verdict
25 of not guilty, that means that -- excuse me -- that means that

1 it only shows that the jury failed to find one of the elements
2 of the crime proven beyond a reasonable doubt, but in this
3 case, that's not the case because these were special findings
4 in a general not guilty verdict.

5 And the third point regarding the *Watts* case is that
6 they held that it was appropriate to increase one's sentence
7 because they say that the crime was committed in a manner that
8 warrants increased punishment.

9 Again, that was the whole point of the second round
10 of deliberations, and the jury found that my racketeering
11 violation was not committed in a manner that warrants
12 increased punishment because my increased punishment would
13 rise to a life sentence instead of 20 years.

14 Another point going along with the acquitted conduct,
15 there's a new case that just came out on Christmas Eve in 2008
16 from the 6th Circuit named *White*. In that case, they
17 explicitly state that even though a court is allowed to
18 consider acquitted conduct, that the 6th Amendment is a
19 backstop. I think that substantiates my 6th Amendment
20 argument.

21 And the case goes on to quote *Apprendi* for the
22 proposition that any fact that increases my statutory maximum
23 must be proved beyond a reasonable doubt.

24 My other point related to my acquitted conduct is the
25 *Rita* case, and in *Rita*, there was a concurring opinion I

1 think -- I'm not sure how to say his name, Scalia. He
2 concurred and held that there could be a 6th Amendment
3 violation and a sentence if it could only be upheld as
4 reasonable based on the judicial fact finding.

5 So today if you make a judicial fact finding that I'm
6 legally liable for the Perez incident, then on appeal the only
7 reason my sentence would be upheld as reasonable would be
8 because of your judicial fact finding today.

9 And then my last argument regarded the acquitted
10 conduct issue is the *Hurn* case, which notes the standard of
11 proof regarding acquitted conduct that substantially increases
12 the guidelines on my case, so as currently standing, I'm at a
13 level 19 without any relevant conduct findings and underlying
14 racketeering findings; but if you make the finding that I was
15 involved with the Perez incident or legally liable for it,
16 then that would raise my guidelines to a level 43. That's
17 what I'm saying, that's a lot of time.

18 So the standard of proof in *Hurn* was like those type
19 of increases in the sentence standard of proof, there may be a
20 due process issue by making that finding by a preponderance of
21 the evidence and instead it would be more appropriate to be
22 found by clear and convincing evidence. But that's the
23 relevant 7th Circuit case law. I'm still asserting that it
24 needs to be proved beyond a reasonable doubt because it
25 enhances my statutory maximum.

1 I've addressed my factual issues. My next issue is
2 about the admission of Fernando Delatorre's testimony in
3 today's proceedings. I'm saying that it should not be
4 admitted. I'm entitled to rebuttal. He's not here to
5 testify. I'm saying under *Crawford*, I'm allowed to
6 cross-examine him because anything used in his testimony would
7 be going toward the fact of the issues asserted, which would
8 be the Perez and the narcotics issues.

9 Then in my memorandum, I cited *McMillan*, I mean
10 *McMillan versus Pennsylvania* where they recognize a case
11 called *Specht versus Patterson* where they said any sentencing
12 proceedings that are conducted while I'm not allowed to
13 cross-examine my accusers violates due process.

14 So according to these Supreme Court cases, Fernando
15 Delatorre's proffer or his grand jury testimony isn't
16 admissible in this proceeding because I'm not allowed to
17 cross-examine him.

18 Other than that, his testimony is unreliable because
19 I had no cross. He tried a statement and I have a signed
20 affidavit. I don't know if that's been submitted to you, but
21 I have an affidavit from 2006 that he wrote. He signed it.
22 It's been notarized. He took an oath that basically he lied,
23 so I'm saying that, because of these facts, that his testimony
24 is not to be considered today.

25 I have an issue -- I'm trying to streamline, excuse

1 me.

2 THE COURT: Uh-huh.

3 DEFENDANT SUSINKA: I got the February 23rd incident.

4 I didn't address this one in my memorandum because I assumed
5 counsel was going to address it, but the PSR claims that it's
6 not relevant conduct, but in case you choose to disregard the
7 PSR in this instance, I feel like I need to address that.

8 I got the same 6th Amendment argument. Attempted
9 murder in Illinois carries a statutory maximum of 30 years, so
10 I think that raises my statutory maximum. It's a Class X
11 felony, 30 years, then there are several enhancements that are
12 applied on the sentencing regarding attempted murder.

13 They got a what's called a 15/20/25 statute where
14 it's 15 years if you possessed a gun during the commission of
15 attempted murder, and it's 20 years added to your sentence if
16 you personally discharged a firearm during the commission of
17 the crime.

18 Even though I didn't personally possess the weapon
19 and I didn't personally discharge the weapon, I guess I could
20 still be held legally liable, so that's why I'm raising it.
21 I'm still saying under the 6th Amendment it raises my statutory
22 maximum.

23 I'm not sure if it applies under the racketeering
24 sentencing statute 1963 because it goes from 20 years to life,
25 so I'm not sure if any increase in my maximum is applicable.

1 So if this is found, would it raise my maximum to 30 years,
2 can they do that under racketeering statute? I'm not sure.
3 But my second issue regarding the 2-23 incident would be
4 Delatorre's testimony. As I said before, it's not admissible.

5 Third, my third point regarding it is more factual.
6 I'm saying that it's not proven by a preponderance of the
7 evidence because I'm assuming that's going to be the standard
8 here. Lorenzo Becerra, when he first made his initial
9 statement the night he was arrested, he didn't mention me, and
10 he never picked me out of a lineup. He picked everybody else
11 out, talked about everybody else, wrote about everybody else.
12 He admitted that he lied. He claimed that somebody else did
13 the shooting, then turned around and changed his story and
14 claimed that he was the one that did the shooting. So his
15 stories are pretty much all over the place.

16 Then in terms that it doesn't fit into attempted
17 murder because there was no intent, instead he pled guilty to
18 aggravated discharge. And I know from my own experience in
19 the state when you allocute you say that you're guilty of the
20 crime, are you pleading guilty because you're actually guilty
21 of the crime? He pled guilty to aggravated discharge, that's
22 shooting the weapon without any intent, so I'm saying there's
23 no intent to be found.

24 His own trial testimony claims that he was coerced,
25 so I understand that that's a mitigating circumstance. So say

1 if he would have, in fact, committed a murder that day, it
2 wouldn't have been first-degree murder. He would have had a
3 chance to catch a second-degree murder because the aggravating
4 circumstance that he felt like he was in danger because he was
5 supposedly threatened with violations or whatever, so there
6 was no intent. Claiming that he was coerced, that's a
7 mitigating circumstance dropping it down not from a -- from an
8 attempted murder to I guess it would be attempted
9 manslaughter.

10 Then also according to his testimony, I took him
11 home, like, between he said they were planning it. Then he
12 claims I showed up. My side is different, but he claims I
13 showed up in the middle of it, and that I drove him to his
14 house and he got out of the truck at his house and, according
15 to him, he went in the house and ate.

16 So at that point in time, there was no -- no
17 liability for me, no liability could have attached to me
18 because I didn't take him to do anything. It wasn't my job to
19 take him to do anything. Nobody told me to do anything, and
20 he claimed during the planning of the incident I wasn't
21 present. There was no proof that I knew what was going on.
22 He said that I was outside of the house. He claimed the
23 planning was going on inside the house.

24 He claimed that he was supposed to call Delatorre,
25 not me, for a ride, so there's -- if he's supposed to call

1 Delatorre but I'm supposed to be driving, why would he be
2 calling Delatorre when he's supposed to be calling me because
3 I be the one to come pick him up according to him.

4 Now, related to this, I got my own testimony. My
5 testimony was that I was not around during the time this
6 incident was being planned. I pretty much ran across these
7 guys by happenstance and I got myself caught up in the mix.

8 I'm claiming that it doesn't amount to an attempted
9 murder because of that because he claims he was coerced and
10 that even if you do find that it does amount to attempted
11 murder, the evidence doesn't show at least by a preponderance
12 of the evidence.

13 My fourth issue related to the attempted murder is
14 concerning the guidelines. The attempted murder, as the
15 government characterizes it, was committed on February 23rd,
16 2002. Now, according to my research in 2004, the attempted
17 murder guideline 2A1.2, I believe, was amended by amendment
18 663 and was raised from a level 28 to a level 33. So even if
19 you make a finding by a preponderance of the evidence that the
20 attempted murder is applicable to me, that my offense level
21 should be a 28 under that finding because it would violate ex
22 post facto principles because at the time of the commission of
23 the crime, the offense level was 28.

24 Second, regarding the ex post facto would have been
25 my withdrawal from the conspiracy upon my incarceration. In

1 2005 the 7th Circuit ruled on the *United States versus*
2 *Paladino*, it focused more on the *Booker* ruling and the limited
3 remand for sentencing, but they also raised some of the
4 factual issues raised by the defendants in that case. And in
5 *Paladino*, they recognized a 2nd Circuit case, *United States*
6 *versus Borelli*, from back in 1962, which I used in my
7 objection to the *Santiago* proffer and in our motion for
8 severance that claims that once a conspirator is incarcerated
9 for a crime that could be considered relevant conduct, that
10 that counts as a withdrawal from the conspiracy.

11 So the 7th Circuit recognized that case in 2005, and
12 so I'm saying that that case could apply and applies to my
13 withdrawal from the conspiracy before the guideline was
14 changed.

15 And then my last issue concerning the 2-23 incident
16 would be even if there is a finding that there was an
17 attempted murder at that day, that I qualify for a six-point
18 reduction for only being an accessory after the fact. So that
19 would drive my offense level from level 28 to a level 22
20 because there was no proof. I didn't take him to the
21 shooting. I didn't help him get away from the shooting. I
22 didn't point anybody out. I didn't provide him with the
23 weapon. I had no direct involvement with the shooting
24 whatsoever. He got away on his own, got there on his own. He
25 bumped into me, so I picked him up; but I believe that if

1 there is a finding that I was involved, that I only qualify as
2 being involved as an accessory after the fact.

3 I'll move on to my reductions in my offense level.
4 Counsel raises the issue that my sentence should be ran
5 concurrent all the way from 2002 under United States guideline
6 5G1.3(b).

7 THE COURT: When does your state sentence end,
8 Mr. Susinka?

9 DEFENDANT SUSINKA: I'm not sure. My state sentence
10 was up in April 5th, 2006. That was my MSR date or my
11 Mandatory Supervised Release date, but now they're still
12 holding me in custody, so I'm not sure exactly when, if
13 they're going to max me out on my whole nine years or make me
14 serve the rest of my parole time, which will be up in two
15 months. I'm not sure.

16 But they argue under 5G1.3(b), so I'm saying in the
17 alternative, if you reject the 5G1.3(b) argument, I'm saying
18 that under 5G1.3(c), which holds that I'm liable to -- or it
19 says that you can run my sentence concurrent from the date
20 that you choose and if you don't choose to run my sentence
21 concurrent at least from the beginning, then in the
22 alternative at least run it concurrent from the day I was
23 brought into federal custody, which is October 14, 2005.

24 And I mean the footnote states, it's note 3(b), I got
25 it quoted right here. It says, "The court may provide a

1 judgment in the criminal case order that the sentence for the
2 instant offense shall commence on a specified date." So you
3 could choose whatever date to start running my sentence if you
4 choose to run it concurrent either from the beginning of April
5 or from October 14th, 2005, when I was brought into federal
6 custody through a writ.

7 My second part to my reductions is another 5G1.3(c)
8 argument, and then footnote (e) -- I mean footnote 3(e) is
9 downward departure provision. Even though my understanding of
10 the law is not saying that downward departures would be
11 considered obsolete, but that's just the language of the
12 guidelines. They call it a departure, so that's what I'm
13 going to use here.

14 I was thinking that if 5G1.3(c) doesn't apply, I mean
15 5G1.3(b) doesn't apply, I think 5G1.3(c) should be applied in
16 a 5G1.3(b) manner because the drug conspiracy could be
17 considered relevant conduct, but it doesn't enhance my offense
18 level. But even though -- but because it doesn't enhance my
19 offense level, 5G1.3(b) may not be applicable. So if
20 5G1.3(b), if you choose not to apply it, in the alternative,
21 I'm requesting a departure under 5G1.3(c) note 3(e), the
22 departure provision for the 81 months I spent in state
23 custody.

24 So it would be because under 5G1.3(b) it says that
25 you should adjust the sentence to account for the time, but

1 since I don't know if I directly fall under 5G1.3(b), the
2 departure under 5G1.3(c), I'm requesting --

3 THE COURT: You were taken into custody on April 14,
4 '05, that's for sure.

5 DEFENDANT SUSINKA: No, October. October 14th, 2005.

6 THE COURT: October 14th.

7 DEFENDANT SUSINKA: Yes.

8 THE COURT: Okay.

9 DEFENDANT SUSINKA: Just it should be --

10 THE COURT: Let me just ask you a couple of things.

11 DEFENDANT SUSINKA: Yes.

12 THE COURT: First of all, there's no acquitted
13 conduct in your case, right? You were not found not guilty of
14 anything.

15 DEFENDANT SUSINKA: Correct, but I believe that the
16 special findings of the jury that I was not involved with the
17 Robert Perez incident may qualify as acquitted conduct. I'm
18 not sure. I'm making the argument.

19 THE COURT: That's just your reading of that finding.

20 DEFENDANT SUSINKA: Right. That's my understanding
21 just in case.

22 THE COURT: You understand that once you were
23 convicted beyond a reasonable doubt of RICO, that alone drove
24 your guidelines into the range of 40 -- what is it, 45. You
25 understand that in terms of your sentencing guidelines which

1 are advisory in nature?

2 DEFENDANT SUSINKA: I understand that they are
3 advisory, but my understanding of it was that it did not, only
4 upon a judicial fact finding that it drove my offense level up
5 to a level 43. That's my understanding.

6 THE COURT: Okay. Well, I would just tell you in
7 response to what you've outlined, given your conviction of
8 RICO, which I know was a hard-fought conviction but
9 nevertheless is a conviction that the jury made beyond a
10 reasonable doubt, I will use the guideline calculations made
11 in the presentence report which indicate that the greater
12 offense level for RICO is 45.

13 Without even getting into the whole situation with
14 regard to Robert Perez, your adjusted offense level is still
15 at a 45, which puts you in the life range, but the government
16 admits and the Court concludes that your statutory maximum,
17 given the jury's determination, is 20 years.

18 Given that the sentencing guidelines are advisory,
19 the question, Mr. Susinka, is what your sentence would be with
20 a 20-year maximum. Do you understand that?

21 DEFENDANT SUSINKA: Yes.

22 THE COURT: And your criminal history is what it is,
23 which is a Criminal History Category IV.

24 DEFENDANT SUSINKA: I have some objections to that
25 calculation.

1 THE COURT: To the criminal history?

2 DEFENDANT SUSINKA: Yes. I made them in my PSR -- I
3 mean my memorandum.

4 THE COURT: In your written submission.

5 DEFENDANT SUSINKA: Right.

6 THE COURT: Okay. And I'm overruling those.

7 So I'm using the calculations made in the PSR.

8 DEFENDANT SUSINKA: Okay. So should I move on? Or
9 you want me to stick with --

10 THE COURT: No, let's just stop right there.

11 Mr. Wagner, do you have any other legal objections?
12 Because I think -- my problem with Mr. Susinka's presentation
13 is he's getting into sentencing allocution also.

14 Do you want to say anything more about that before we
15 turn it over to Mr. Susinka?

16 MR. WAGNER: I know Mr. Rimland wanted to address the
17 issue with regard to the consecutive versus concurrent, but
18 not with regards to the Court's position about the 20-year
19 statutory maximum.

20 THE COURT: Okay. Well, I'm concluding the 20-year
21 statutory maximum does apply. I'm going to sit Mr. Susinka
22 down, and we're going to start with the government arguing
23 what it thinks is an appropriate sentence. Then I'll hear
24 from either of Mr. Susinka's attorneys, and then finally I'll
25 hear from Mr. Susinka again.

1 MR. WAGNER: All right, sir. Thank you.

2 MR. POPE: Thank you, your Honor.

3 THE COURT: Go ahead.

4 MR. POPE: Your Honor, if I may --

5 THE COURT: Yeah.

6 MR. POPE: -- just one point of clarification. I
7 understand your rulings regarding adopting the PSR guideline
8 calculations there.

9 THE COURT: Okay.

10 MR. POPE: I don't know if I heard this wrong. I
11 believe you said "without getting into the Robert Perez
12 issues."

13 The issue that I have with that is the guideline
14 begins at 43 because the Probation Office concluded based on
15 evidence that the government submitted that he was involved as
16 a driver in the Robert Perez murder irrespective of the
17 not-proven finding in Phase 2 of the trial.

18 THE COURT: Right.

19 MR. POPE: So it is relevant, and I believe you need
20 to make that finding.

21 THE COURT: To that extent, I did misspeak.

22 Without getting into the RICO Act 3, murder of Robert
23 Perez, technically, but I understand that relevant conduct is
24 what's getting Mr. Susinka into the 45 offense level as a
25 driver. I understand that.

1 And my conclusion with regard to that, which you can
2 go ahead and argue. Your argument is that preponderance of
3 the evidence shows that he was the driver, right?

4 MR. POPE: Certainly preponderance of the evidence
5 and even under clear and convincing if that were ever held to
6 be the standard, under either one of those standards.

7 THE COURT: Okay. And I conclude that that is, in
8 fact, the case, based on the evidence at trial.

9 So you can proceed.

10 MR. POPE: Thank you, Judge.

11 With respect to the 3553(a) factors, I would
12 incorporate my -- the government's sentencing memorandum that
13 was previously filed and submitted to the Court in this case.
14 The -- if I can have one moment, your Honor.

15 THE COURT: Sure.

16 MR. POPE: Too many pieces of paper.

17 As we set forth in that, the facts of this case, the
18 nature and circumstances of the case are horrific. Your Honor
19 sat through the trial, sat through one sentencing already,
20 that I don't think that's in dispute, the history and
21 characteristics of this defendant.

22 As we set forth in our sentencing memorandum, that
23 demands a 20-year sentence in this case consecutive to, which
24 I'll come to in a bit, the time that he's already doing in the
25 state court.

1 This is a defendant who as evidence proved at trial
2 between October 2001 and April 16th, 2002, when he was taken
3 into state custody, he was in Aurora for a little over
4 four-and-a-half months, and in that time period, he was
5 involved in the first incident that he has with the police,
6 he's hooding up. He's doing what Shorties do. He's out in
7 the 'hood, hanging out with other Insane Deuce gang members.

8 Second, in November 2002, he's arrested running from
9 Brian Hernandez's house, Brian Hernandez, who was the overseer
10 of the Shorties in 2002 and then also Rafael Vasquez, who was
11 overseeing the Shorties at that time. He runs with a gun.

12 He then moves -- his mother essentially cuts a deal
13 with the state. He's going to leave the state. He leaves, he
14 comes back, we heard the testimony at trial as to why, the
15 circumstances why he came back. Came back by his own
16 admission on February 1st, 2002.

17 Eleven days later, he is the driver on a murder, the
18 murder of Robert Perez, and it wasn't just I'm in a car. Some
19 guy hopped out. I didn't know what was going to happen, you
20 know, and killed somebody.

21 This is the defendant who's with his other gang
22 members driving around in his mother's van, driving around
23 people, hunting for people. You heard the testimony. They
24 were hunting, trying to find someone to kill, and they're
25 there multiple -- it takes hours, hours to find somebody.

1 They finally do it. Harold Crowder gets out of the
2 car, runs to that trailer, murders Robert Perez, runs back to
3 the car, and the defendant drives him away, drives him away.
4 And being Insane Deuces, and they're good at this
5 unfortunately, they call so that they can separate the driver,
6 and Fernando Delatorre is also in the car, from Harold
7 Crowder, the shooter, and the gun. So they call Orlando
8 Rivera. They separated and they go their ways, different
9 ways.

10 The next day, the very next day, he's out again doing
11 what Shorties do. They put out. They hold down guns. They
12 commit murders, drive on murders. They spray paint, too.
13 They're marking their territory. They not only mark their
14 territory with guns and murder, but they spray paint so that
15 no one, even when you're walking down the street in Aurora
16 when you're not being shot at, you still see the graffiti, the
17 constant fear that they're imposing. This is our town. We
18 can take this town.

19 No, they can't.

20 Less than a month -- or eleven days -- ten days
21 later, he's a driver on an attempted murder. That's
22 February 23rd. February -- March 13th, he's caught with a gun
23 that's used in a double attempted murder after he comes out of
24 of Brian Hernandez's house.

25 The next day, he and Fernando Delatorre are shot at,

1 rival gang members trying to kill them. Does he say, well,
2 you know, this is who did it? No, because that's not his way
3 or the Insane Deuce way.

4 What they do is they shot up, and they handle it
5 themselves. They take care of business themselves. And what
6 does that mean? It means we go out and we kill.

7 April 10th, Shorty meeting. April 11th, April 15th,
8 he's there, selling drugs, doing the other things that Insane
9 Deuce Shorties do, selling drugs.

10 April 16th, the day he's arrested and he's finally
11 taken off the street, he's wrestling a police officer with a
12 gun. He was very, very good at his job, and he became a
13 trusted confidante and lieutenant of Fernando Delatorre, who,
14 by anyone's measure, is -- I mean it's staggering the crime
15 wave that he was responsible for as an Insane Deuce gang
16 member.

17 But that's who Fernando Delatorre hung out with,
18 Stephen Susinka. He was fantastic at his job. They
19 recognized it, and what's sad about this case, and as I sat
20 here throughout pretrial hearings in this case and today, your
21 Honor, is what's sad about this case is he's a smart kid or a
22 smart man. He sits there, he's smart. He's intelligent. You
23 can tell that from the arguments he made pretrial, the
24 arguments he made today. He gets it.

25 It's both sad, but at the same time, it's scary

1 because your Honor also knows how this gang works, and this
2 gang works by the smartest, the most organized, the best
3 leaders rising up through the ranks, becoming leaders in this
4 gang. And prison doesn't stop it. When he gets out and he
5 gets that perverse respect that prison and doing time on
6 behalf of this organization is going to get him, it wouldn't
7 surprise me in the least if he's a leader, given his
8 intelligence and how good he is at his job, just like Bolivar
9 Benabe when he got out in 1997.

10 His actions, that crime spree that he was on in those
11 four-and-a-half months by any measure is -- shows that he
12 repeatedly demonstrates that he has no respect for human life
13 or the laws that govern normal society.

14 To this day, even standing here today, and this is
15 what surprised me the most about today, standing here today,
16 he still denies everything. He took that stand during trial,
17 committed perjury, lied through his teeth repeatedly: No; no;
18 no; I don't recall; I don't know about anything. He doesn't
19 even -- won't even admit that Fernando DeLatorre, the man who
20 wore Insane Deuce on his chest, could not have been prouder of
21 anything else in the world than the fact that he was the
22 leader of the Shorties and an Insane Deuce gang member was an
23 Insane Deuce gang member.

24 He won't admit that his sister was an Insane Deuce
25 gang member. Brian Hernandez, his mentor within the gang, his

1 sister's boyfriend, wouldn't even admit that, and he's
2 standing here lying about it again today. It's offensive. It
3 was offensive when he took the stand at trial, and it's
4 offensive today.

5 The only -- his response repeatedly throughout the
6 trial, and I think I heard some of it today, is the police.
7 Other people are responsible for what I did. When he was
8 confronted on cross-examination with that October 2001 arrest
9 for hooding up, well, the police actually dragged me down the
10 street and put me with these two other Insane Deuce Shorties.

11 Everything is someone else's fault, mostly
12 overarching police officers. It's not. It's the actions,
13 it's the decisions that he made throughout his life, and the
14 decisions he made throughout his life were murder, mayhem,
15 attempted murder and drug trafficking. That's -- and gun
16 trafficking. That's what he did. That's who he is, and it's
17 all his choices.

18 The -- if you strip it down, even if you take,
19 putting aside those ten acts in those four-and-a-half months
20 that he was arrested for, arrested for, not even other things
21 that he did during that time period, one murder, one attempted
22 murder, the only appropriate sentence is 20 years maximum
23 sentence. The deterrence factors, the messages it sends, all
24 of that is appropriate, and we argue that that should be
25 sentenced -- that should be consecutive to the time he's

1 already done, he's serving right now on his state sentence.

2 THE COURT: When does the state sentence end?

3 MR. POPE: I don't -- he is -- he would have been
4 paroled prior to today, no question about that, given the
5 normal rules. He's remained in custody, but his state
6 sentence was nine years from April 16th of 2002, putting aside
7 any credit that he would have received. He received a
8 nine-year state sentence on April 16, 2002.

9 THE COURT: So the consecutive versus concurrent, it
10 sounds to me that we're talking basically a one-year
11 difference?

12 MR. POPE: No, we are not. We are talking about if
13 it's concurrent and it goes back to April 16th of 2002 --

14 THE COURT: Okay.

15 MR. POPE: -- with the state sentence, then we're
16 talking about a six-and-a-half year -- is that -- roughly
17 six-and-a-half years, six-and-three-quarters years.

18 And the sentence if it's imposed today, the federal
19 sentence can start today; but given his involvement 26-,
20 27-year sentence is functionally what it would be, given his
21 guideline range and given what he did in this case, that's a
22 small price to pay for what he did in this case: The murder
23 of Robert Perez, the attempted murder on February 23rd at the
24 Porta-Potty, the guns, the drugs, everything that he did and
25 who he was. It's a small price to pay.

1 There is no question and there is no dispute, your
2 Honor, it is within your discretion. I went through in our
3 sentencing memorandum and I went through the guidelines
4 analysis. I believe that it is -- under the guidelines, it
5 falls in the category where it says it shall be consecutive.
6 I believe that's an act based on the analysis and the drug
7 conviction for which he's doing time and the gun conviction
8 for which he's doing time are under 2E1.1, the RICO guideline,
9 and the application notes to that are not considered relevant
10 conduct. They are not considered -- they're considered
11 criminal history points instead. It falls in that.

12 But regardless, the guidelines, as we all know, are
13 advisory. It's fully within your discretion; but, again, it
14 is a small, small price to pay for what he did for all the
15 reasons that we submitted in the post-trial -- at trial, in
16 the post-trial briefing, and in our government's version.

17 He needs to be taken off the street so that the
18 people of Aurora can be safer for as long as possible, and
19 make no mistake about it. Every day that Stephen Susinka
20 spends in jail the people of Aurora, the children of Aurora,
21 are safer.

22 THE COURT: Mr. Rimland or Mr. Wagner.

23 MR. RIMLAND: Your Honor, if I can just quickly
24 address the issue of --

25 THE COURT: Sure.

1 MR. RIMLAND: -- concurrent versus consecutive.

2 THE COURT: Okay.

3 MR. RIMLAND: Thank you.

4 I disagree with Mr. Pope with respect to the
5 mandatory nature under the guidelines with regard to 5G1.3(a)
6 if the Court were to find it acceptable under (a) or
7 applicable under (a).

8 First we cited the case to the Court, which is *U.S.*
9 *versus Schaefer*, I believe, a 7th Circuit case, indicating very
10 clearly -- *U.S. versus Schaefer*, indicating very clearly that
11 it's not mandatory, but it's discretionary.

12 Then looking at the question of whether or not the
13 offenses for which he was sentenced in the state court, it is
14 my humble opinion that those matters were relevant conduct in
15 this case and is provided for in 5G1.3(b), that those two
16 offenses would be considered relevant conduct and that by
17 virtue of 5G1.3(b), that it would be required under that
18 guideline, the same as Mr. Pope has indicated under (a), that
19 it would be required that he be sentenced to a concurrent
20 sentence.

21 Most respectfully, what I'm suggesting to the Court
22 is absolutely discretionary based upon the case law, based
23 upon the circumstances of the events that led to the state
24 court convictions, I believe are part and parcel of what the
25 government had to prove in this case in order for purposes of

1 establishing their proof beyond a reasonable doubt that
2 Susinka was guilty of the RICO conspiracy.

3 And I most respectfully also suggest, your Honor,
4 that he was in prison at the time, and I'm just responding to
5 the written argument of the government, that he was in prison
6 at the time of the balance of the conspiracy. Therefore, he
7 should not be held responsible for it because of the
8 withdrawal from the conspiracy. That's what I wish to add to
9 this Court.

10 THE COURT: Thank you, Mr. Rimland.

11 Should we go back to then Mr. Susinka, or do you want
12 to add anything, Mr. Wagner?

13 MR. WAGNER: Only if the Court would allow me. Today
14 when we arrived, Stephen's parents are both here, Judge.
15 Mrs. Susinka actually had handed me a letter by way of
16 mitigation from a parent to the Court --

17 THE COURT: Okay.

18 MR. WAGNER: -- and had asked me, with the Court's
19 permission, if I were allowed to read it into the record.

20 THE COURT: Sure, you can read it into the record.

21 MR. WAGNER: Thank you, Judge.

22 THE COURT: And I have read your previous written
23 submission --

24 MR. WAGNER: Thank you, your Honor.

25 THE COURT: -- along with the exhibits, but go ahead.

1 MR. RIMLAND: Excuse me. I'm sorry, your Honor, may
2 I quickly interrupt something that popped into my head that I
3 forgot.

4 I wish also to state that if this Court were to
5 consider not imposing a sentence, a concurrent sentence with
6 the state court sentences that Mr. Susinka is presently
7 serving, that at least the Court consider giving him credit
8 for the time he's been in federal custody. I think that that
9 would be an appropriate matter for this Court.

10 Thank you.

11 THE COURT: Okay.

12 MR. WAGNER: It's dated January 19, 2009, and it
13 states:

14 Your Honor: My name is Theresa Susinka, and on
15 Tuesday, January 20, 2009, you'll be sentencing my son,
16 Stephen Susinka. As a parent, I appeal to you for your
17 leniency with respect to Stevie's sentence. You see, your
18 Honor, Stephen will always be Stevie to his family. Since the
19 age of 18 years old and for the last seven years, Stephen has
20 been paying the price for the mistakes of his youth.

21 As a parent, one takes pride in their child's
22 achievements and accomplishments and anguish over their
23 mistakes; but no matter what the child has done, they are
24 still your child, and you love them -- and your love for them
25 never diminishes. Stevie has made mistakes, and he has taken

1 responsibility for them and has deep regret for each action
2 that brought him to the place he is today.

3 Over the last seven years, he has made the best out
4 of a bad situation. Instead of feeling sorry for himself and
5 becoming a problem inmate, he has worked toward and achieved
6 his G.E.D. At his previous facility, he took college courses,
7 which are unfortunately not available at the facility he's
8 currently at. He has been active in his own defense, writing
9 many motions and appeals and helped other inmates writing
10 theirs as well. He's taught himself these skills by learning
11 and studying the law as it applies to each individual
12 situation.

13 People who do not know Steve have been amazed at the
14 level of professionalism with which he conducts himself.
15 During the past seven years, he's also learned to cut hair,
16 and works in that capacity.

17 Above all, and through all of the ups and downs of
18 the past seven years, his biggest concern has always been his
19 family. No matter what he has endured personally over time,
20 he has always told us, especially me, that he's okay, that I
21 should not worry; but as a parent, how can I not?

22 I've seen my son be moved from facility to facility
23 over the years, have had long periods of time where I could
24 not see him, yet he never failed to make weekly calls and sent
25 letters to us that we knew he was okay.

1 Has my son made mistakes? Yes, he has, and not only
2 has he taken responsibility, but he's also shown remorse for
3 them. When he was initially arrested he was a young kid who
4 got himself involved with the wrong people.

5 I only ask you to give due consideration to his time
6 served, and as a parent, I ask for leniency when you pass
7 sentence on him. My wish for my son is to be paroled for time
8 served so that he can take the skills that he's learned and go
9 on to be a productive member of society.

10 As you can surely understand if you are a parent, all
11 I want for my son is happiness in his life and a safe and
12 productive future for him and hopefully for him to some day be
13 able to start a family of his own.

14 So, your Honor, I thank you for your time that you
15 have given to read this letter, and I appreciate all due
16 consideration that you may give to my son. As a parent, it
17 would give me no greater joy than to have my son come home
18 after all these years and start his life fresh. With your
19 help, he may be able to do just that.

20 With deepest sincerity, and it's signed Theresa
21 Susinka.

22 Thank you, Judge. If I can just add a couple of
23 personal comments.

24 THE COURT: Sure.

25 MR. WAGNER: Your Honor, I've been a lawyer, in April

1 it will be 30 years, and from time to time both in state and
2 federal court, I've had the opportunity to represent numerous
3 people who have endeavored to take on their own cause by
4 writing motions, representing themselves and doing whatever.
5 And I find, as the government has indicated and I know your
6 Honor has taken note of, that Steve has some exceptional
7 talent. I was first taken by it when he considered actually
8 representing himself and there was a give-and-take between you
9 and Stephen with regards to his ability to actually conduct
10 himself in court, and I was most impressed.

11 And at that point, I was convinced that your Honor
12 was actually leaning towards allowing him to represent
13 himself.

14 But I'm glad that he chose then to withdraw his
15 request and allow Mr. Rimland and I to continue to represent
16 him during the course of the trial; but I was impressed by his
17 ability not only to get up and speak but in the written
18 motions that he's presented, but most importantly by his
19 ability to conduct himself with grace under pressure, and
20 certainly giving all the due respect that he could both to the
21 Court and to the government.

22 His rehabilitative potential to me is enormous. So I
23 say that just as a personal reflection as being his lawyer for
24 the last few years, and, again, can only add my sentiments to
25 his mom that the Court give all that due consideration.

1 Thank you, Judge.

2 THE COURT: You're welcome.

3 Mr. Susinka, is there anything else you want to add
4 before I sentence you?

5 DEFENDANT SUSINKA: Yes. Can I blow my nose first?

6 THE COURT: You can stand up.

7 DEFENDANT SUSINKA: Can I grab some Kleenex and blow
8 my nose?

9 THE COURT: Sure.

10 THE CLERK: I've got some right here.

11 (Pause.)

12 DEFENDANT SUSINKA: I don't know, I still got some
13 legal arguments I guess I need to add. I mean if you want to
14 make this part of my allocution.

15 THE COURT: If they relate to sentencing, you're free
16 to make them.

17 DEFENDANT SUSINKA: Okay. Just I'm not even going to
18 go over the argument, I'm just going to let you know that I
19 feel like I -- I mean I qualify for mitigating role reduction
20 and a reduction, I guess, in the guideline 5K2.0. I think
21 it's under the *Rita* case that says that the guidelines, if the
22 guidelines fall off of the heartland of the usual case that
23 the guidelines apply to, I'm saying that the heartland of
24 cases that the guidelines are meant to apply to are cases that
25 people were actually found guilty of.

1 I object to the obstruction-of-justice enhancement,
2 the two points.

3 THE COURT: You realize it hasn't even been used.

4 DEFENDANT SUSINKA: You calculated my offense level
5 to 45 based on the PSR.

6 THE COURT: Right.

7 DEFENDANT SUSINKA: That's with the two points.

8 MR. POPE: Which applied the obstruction of justice.

9 THE COURT: Which applied, okay. So you're objecting
10 to that. Your version is that you did not obstruct justice in
11 your testimony at trial.

12 DEFENDANT SUSINKA: Yes. I got a case. For the
13 record, *United States versus Thundershield* from the 8th Circuit
14 decided January 28, 2007. They tried to enhance the sentence
15 for testifying at trial. They said that it's not perjury, and
16 I quote, "simply because a defendant testifies on his own
17 behalf and the jury disbelieves him." That's directly from
18 the case.

19 Then, I guess --

20 THE COURT: So your position at trial and here and
21 now, just so I understand this, is that you at that point were
22 charged offenses and at trial and here and now are not an
23 Insane Deuce.

24 DEFENDANT SUSINKA: I wish not to respond to that.

25 THE COURT: That's probably smart, but I will tell

1 you it's my conclusion, so that the record is complete, that
2 you lied numerous times during the trial. So I have no
3 hesitation using the obstruction-of-justice enhancement.

4 So if I were you, I'd move on it to some other
5 argument.

6 DEFENDANT SUSINKA: Okay. I just wanted to make my
7 record.

8 I guess I got the what's called the parsimony
9 provision of the guidelines. There's a case from the 4th
10 Circuit, *United States versus Ibanga*, I-B-A-N-G-A. It was a
11 sentencing memorandum written by the judge that claimed that
12 under 3553(a)(2)(a) that sentencing a defendant for acquitted
13 conduct -- I guess I'm stuck on the acquitted-conduct issue --
14 but it wouldn't promote respect for the law because I guess
15 being born and bred in the United States, you're raised with
16 the belief that you have a right to trial and that you'll only
17 be sentenced for issues that were -- basically you were found
18 guilty for at trial. And I was only found guilty of
19 conspiracy, which the focus of the conspiracy is the
20 agreement.

21 The seriousness of the offense, I say the jury's
22 verdict speaks for itself. They let me off for the Perez
23 incident. They didn't make a ruling for the drug conspiracy.
24 I wasn't part of any drug conspiracy with any Insane Deuces.
25 So the offense, my offense involves only carrying a gun,

1 according to my version, carrying one gun. I sold some drugs
2 on my own. I didn't pay any dues, and I was, according to my
3 version, an accessory after the fact on attempted murder.

4 So the seriousness, it can be held as serious, but at
5 the same time, you know what I'm saying. I don't know. I
6 been shot before. I been shot at numerous times. Supposedly,
7 you know what I'm saying, whatever was going on out there,
8 whatever I been through it, so maybe I might be desensitized
9 to what it is, as to the seriousness of shootings and all that
10 type of deal, whatever, guns and drugs.

11 They talk about just punishment. I feel like I've
12 already been jailed for a long time. It's been seven years.
13 Almost seven years, six years and nine months. I was young.
14 I mean the Supreme Court says that age is a considerable
15 factor. So, I mean, my age comes into play. I might get to
16 that in a second.

17 Another part of 3553 is the deterrent effect. I mean
18 I don't know how -- the government is pushing for a 20-year
19 sentence, claiming that it's going to send a message to the
20 street. I mean the only message I see it sending is that you
21 go to trial for nothing. I mean you go to trial to get
22 certain factual issues determined and once they get
23 determined, they get ignored. So there's no deterrent effect
24 to that in my eyes. But, whatever, you know what I'm saying?
25 Whatever is going to happen is going to happen today.

1 Incapacitation, I mean I've already been
2 incapacitated for seven years. I committed my crime, I
3 accepted my responsibility back then. I mean there's nothing
4 to worry about coming from me. I wasn't a full-fledged,
5 hard-core gangbanger. I mean you believe what you believe.
6 You believe I'm an Insane Deuce.

7 MR. RIMLAND: Excuse me one second, your Honor.

8 THE COURT: That's okay.

9 (Counsel and defendant confer.)

10 DEFENDANT SUSINKA: I mean, I just feel like I'm --

11 MR. RIMLAND: Thank you, your Honor.

12 DEFENDANT SUSINKA: But, I mean, I just -- I been
13 incapacitated for seven years already. And I feel like if I
14 were to go home any time before 20 years, I think it makes no
15 difference because my mind is already made up about what I'm
16 going to do when I get out, so --

17 THE COURT: What are you going to do?

18 DEFENDANT SUSINKA: I feel like I'm going to go home
19 and conduct myself like I'm supposed to, like an adult, like a
20 man. Find a better way to make a living for myself and avoid
21 all the B.S. So I don't know. I been through enough already.
22 So I mean that's just how I feel, but I feel like I've been
23 incapacitated long enough.

24 I'd even say that incapacitation doesn't even come
25 into play anymore because me being in jail isn't what would be

1 keeping me from committing further crimes, so whether I was in
2 jail or out on the street, I wouldn't be committing any
3 crimes.

4 Rehabilitation, the parsimony provision, I mean I
5 guess I've been rehabilitated. I mean I still have the same
6 mentality. It's just I made some bad choice, I made the wrong
7 choices. I got -- I guess now I go into, like, my allocution,
8 I guess.

9 As I wrote in my memorandum, I wasn't a bred
10 criminal. I feel like I pretty much had a normal upbringing.
11 I wasn't raised in a household full of guns and drugs and
12 gangbangers and stuff like that. So that's not what my
13 parents raised me to be; but, you know, I was raised in a bad
14 neighborhood, so I was exposed to a lot more negative than
15 positive, you know, when I grew up.

16 And watching my mother and my father, they worked day
17 to day, you know, like struggling, living paycheck to
18 paycheck. I guess, to me, that wasn't an appealing lifestyle;
19 and when I was young, I wanted money at a young age, so I
20 started doing what I did to make money.

21 But I still feel like I wasn't a bred criminal. It's
22 just a choice because I see some people, I hear their stories
23 about how they ended up in jail and how they were brought up
24 in Chicago and this and that, and my story doesn't even amount
25 to a quarter of, half of the drama they've been through to

1 make them do what they did and become incarcerated.

2 But because, like, I'm not one of those bred
3 criminals and it's not like my only way of life and because
4 the way I was raised, I feel like that would be like a proper
5 mitigating factor.

6 Another one is that because I was shot, you know, I
7 was like -- I just turned 17 when I was shot. I didn't know
8 how to react to that. You know, I'm young. There's a lot of
9 things going on.

10 You know, people shoot at me, they shoot me. I don't
11 know how to react to that, so, I mean, I feel like I had to
12 pick up a gun to protect myself. Even though I might not have
13 been out there running around, like, gangbang, shooting
14 people, but I was ready if they came to me to defend myself.

15 Then there was rumors, takeover of my neighborhood
16 where I live right there, back then. Prior to my 18th
17 birthday, they thought I was a Deuce, all right, 'cause I hung
18 around. So they're shooting at me. They're coming at me
19 everywhere I'm going.

20 So, whatever, because they want to take over my
21 neighborhood. They either want me dead or gone, and I can't
22 move anywhere. I don't have any money, and that was around
23 the same time I ended up leaving for California.

24 My mom came to me. She was, like, basically begging
25 me to leave because she was worried about what was going on,

1 and I could have stayed. It doesn't matter. He claims it was
2 part of negotiations. Oh, my mom did this and that to
3 negotiate a deal.

4 I know what I testified to, but I guess now that I
5 recollect, I don't think it was part of a negotiation. I
6 think she maybe went and asked for permission, but it wasn't a
7 negotiation that, oh, we'll drop this if you leave because
8 this was all my mother's idea, not the prosecution's idea,
9 because she wanted me to leave.

10 So I could have stayed because like I wrote in my
11 memorandum, why worry about being locked up for a petty
12 probation violation. What are they going to lock me up for,
13 30 days when I'm out there carrying a gun and selling drugs?
14 That obviously got me nine years in prison, or, well, a
15 nine-year sentence, and it's still been lasting on going now
16 for almost seven years.

17 So upon my own initiative but my mother's
18 encouragement, I left voluntarily to California. I left -- I
19 just turned 18, so I was, like, all right, leave it all
20 behind. That's not doing me any good anyway. So on my own, I
21 turned and I left.

22 But when I got there, things weren't going as
23 planned, and I seen something. I made an accusation that my
24 grandfather was raping my cousin, okay? So I make the
25 accusation because even though I didn't know them that well, I

1 wasn't raised with them as family, they were blood. So I felt
2 like since I was -- since they were blood, that I would bring
3 it to somebody's attention.

4 So once I make the accusation, there's a big
5 argument, a fight breaks out, and they kick me out. So I
6 leave, and I come back.

7 I mean up until that point, yeah, it's my fault
8 because I made the accusation; but I believed I was doing what
9 I thought was right. I mean stuff like that going on, I mean
10 I don't believe in that type of thing, and I don't like that.

11 So I just brought it to everybody's attention. They
12 chose to side with my grandfather by marriage. And so they
13 booted me out, and I had to come back.

14 I thought about staying. I was going to stay because
15 I still had some money in my pocket, but at the time there was
16 so much going on in my mind, I was just -- I wanted to get
17 back to what I knew, what I knew was familiar. So I went
18 home.

19 Then like I wrote in my memorandum, I stopped in Las
20 Vegas. I thought about staying there, but then -- 'cause I
21 was so focused on just getting out of there and going home, I
22 just ended up going all the way home.

23 Then once I get home, after everything is all said
24 and done, I end up in jail. I end up finding out that the
25 same accusation that I made to my grandfather was made towards

1 him at least on two other occasions, my grandfather by
2 marriage.

3 So, I mean, I was right in doing what I did, in
4 trying to stop what was going on. So supposedly after I made
5 that accusation, my cousin, they ended up moving away from my
6 grandfather. I don't know. All I'm saying is the point of
7 that is that I left, and that shows that that wasn't my intent
8 to be out there leading a life of crime. I voluntarily left,
9 and I stopped doing everything. I left everything. I left my
10 cell phone. I didn't take anything. I just took some money
11 and my clothes. I went out there and bought everything brand
12 new.

13 I was looking for a job, and I signed up for school
14 because I was trying to finish my high school education and
15 get my diploma and then make up my mind what I want to do next
16 once I reached that level and get my diploma. But everything
17 got blown out of the water. I had no control over it, I
18 guess, because the way everybody reacted to it -- the way I
19 imagined everybody reacting to it wasn't the way everything
20 that unfolded.

21 Then when I came back from California, my mentality,
22 like, I was so messed up, like, I was still young, I think,
23 you know, I had just turned 18, and I was mad because I left
24 on my own and I tried to do something better with myself, and
25 it just didn't work out.

1 So I felt like -- like it was failed. When I tried
2 to do something right, it failed; but when I'm doing things
3 that are wrong, it seemed to be working out. I'm selling
4 drugs, I'm making money. So it's like, phew, so in my eyes,
5 like, that's going favorable to me. But when I try to go to
6 school and get a job, I can't find a job. And I finally sign
7 up for school and I end up getting kicked out, you know, from
8 my grandmother's house, so I got nowhere to stay, so I gotta
9 come back home. So my mentality was, like, I pretty much gave
10 up, I gave up on myself, and I shouldn't have done that, but I
11 did, you know.

12 I mean that's just pretty much what happened, you
13 know what I mean? I didn't come back, I didn't mean to start
14 hanging around and doing this and whatever you feel I'm
15 responsible for; but that was just my mentality, man. I was
16 lost. I was young, and I was lost. I feel like I was trying
17 to be something I'm not. I lost myself, forgot who I was, and
18 turned to the -- turned to the wrong direction.

19 But past that, I got my own self-rehabilitation
20 efforts. Before the indictment in this case, I got my G.E.D.
21 on my own. Nobody pushed me. I see people cooperating with
22 the government. They're pushing them, putting them in school,
23 and they're still not even achieving, getting their G.E.D. or
24 no high school diploma. They're still sitting up there
25 smoking weed, living at their mom's house. But that's how I

1 done. And that's with people pushing them to do that, and
2 they're still not even doing it. But on my own, I took it
3 upon myself because that's my mentality was to try to better
4 myself. Because it's a dead-end. I see where it's going.
5 There's no getting away with this.

6 So I took it upon myself. I seen the education.
7 That was my goal from the beginning, but it failed in
8 California. So I got another chance to get my education, so I
9 go and I get my G.E.D. right away. That's the first thing I
10 did when I got to IDOC. I signed up for school. They put me
11 in G.E.D. class. I pass it, get my G.E.D.

12 Soon as I get done with my G.E.D., I want to advance
13 my education. They're offering college courses, so I take
14 college courses. I purposely stopped taking the college
15 courses because I was getting ready to go home, and I wanted
16 to leave that unfinished, so once I get home, I finish that up
17 on the street in a real either university or like a local
18 college or something like that, just to finish getting my
19 associate's.

20 At least I would get some type of education that
21 would help me with better finding a job. But these are my own
22 self-rehabilitation efforts before this indictment. It's not
23 an attempt to build a mitigation case. It's not like I caught
24 this indictment, then I started taking all these classes and
25 going to church and turn religious just because I caught this

1 case, now I'm trying to earn a lower sentence. This was
2 before this case happened, before the government became
3 involved, and it was just me on my own doing my time, focusing
4 on going home, but trying to prepare myself to get to the
5 street and be prepared to face the world as a man.

6 I picked up a couple skills while in jail. I became
7 a barber, just picked up the clippers, started cutting hair.
8 So that could help me if or whenever I get released. You
9 know, I can go home. I can cut hair, try to open a barber
10 shop or something. I don't know. Maybe improve the economy,
11 since if I own a barber shop, I'll be offering jobs so there
12 will be open jobs, I guess.

13 I kind of became like somewhat of a jailhouse lawyer
14 or paralegal, whatever. I gave that consideration, like
15 whenever I were to go home, I could go finish, get a paralegal
16 degree because I think I'm pretty good at that, the way I
17 write at least. I don't know about my oral presentation, but
18 the way I write I think is good enough to qualify as a
19 paralegal. All I got to do is get the education.

20 Then I guess my last one was the age, or one of my
21 last ones was the age, past and present. My age back then.
22 Like the *Gall* case, they cite *Roper versus Simmons*, but the
23 *Gall* case quotes saying "that a lack of maturity and an
24 undeveloped sense of responsibility are qualities that often
25 result in impetuous and ill considered actions."

1 So even though my age might not, like, be a total
2 excuse for my immaturity, it comes into play, you know what I
3 mean? I mean add on to, like, the situation with California,
4 people shooting at me, there's just so much going on, like, I
5 don't know how to react. I only seen one way to react, and
6 that was to try to protect myself.

7 But I think my age should be taken into
8 consideration, my past age, because all this case is built on
9 I was 18 years old. I had just turned 18, and I was only out
10 there for two months in Aurora at the age of 18. The
11 government cites four months.

12 When I was 18 years old, I was out there for two
13 months, two-and-a-half months. I came back February 1st to
14 April 16th, 2002. I was 18, a fresh 18.

15 My last one is I think I have a strong potential for
16 rehabilitation. I made up my mind, you know, a long time ago
17 before any of this even happened, and that's why it kind of
18 blindsided me. I haven't been around anybody, like, from my
19 neighborhood the whole time I was locked up. I rotated -- I
20 mean, I got around on my own. I didn't mess with anybody, any
21 of the gangbangers, no nothing like that. I distanced myself
22 from that. People I knew from the streets, I distanced myself
23 from them, like -- but the gangbangers, anybody I knew from
24 the streets, that's who I wasn't around, but there were other
25 people I bumped into that I knew, like, from the area, but

1 they weren't Deuces, now, but I still pushed myself away. I
2 didn't want anything to do with Aurora.

3 You have your own opinion regarding my intelligence
4 and my ability to rehabilitate myself or what you think I'm
5 going to go home and do. The government thinks I'm going to
6 go home and try to gangbang. Why would I do something as
7 stupid as that when, from what I see, just apparently being in
8 a gang is what's going to end me back right here where I'm
9 sitting right now in the same type of situation that I don't
10 want to be in. I'd rather be on the streets fulfilling my
11 life.

12 Like today, I was talking to a 58-year-old man, and
13 he was telling me that there's still a lot of things in life
14 that he wants to experience, and he's 58 years old. I'm 25.
15 So I'm sitting there thinking, like, man, how much could you
16 have done so far in your life to where you've reached 58 years
17 old and you still want to do more.

18 So I'm thinking all the things I sit here and I think
19 about I want to do. By the time I reach 58, I'm not going to
20 experience a lot of the things that I think I'm going to be
21 able to experience between now and then, so -- so by me being
22 in jail, you know what I'm saying, it's cutting me off, you
23 know what I'm saying. It's just helping me, like -- like, I
24 don't know, like, I just don't want to be sitting in jail,
25 know what I'm saying, like, wishing this and wishing that,

1 should've, would've, could've, but maybe it's too late for
2 that.

3 But I don't know. I think that's pretty much it. I
4 mean I don't see myself, like, on a life sentence installment
5 plan. I've seen the guys in the joint. It's like their
6 fourth time in the joint. They're, like, 45 years old, been
7 in and out, in and out, in and out. That's not me. I'm not
8 the type of person to keep banging my head against the wall.

9 You've got your own opinion, like I said, of my
10 intelligence. You think I'm the type of person to do that or
11 not, it's your ruling, your opinion.

12 So then I guess I'll finish off from the *White* case,
13 it's the most recent case. It just talks about, it's like one
14 of the essential points -- this is a quote from the case:
15 "One of the essential points of *Booker*, which was highlighted
16 by *Kimbrough versus United States*, is that a district court
17 judge may disagree with the application of the guidelines to a
18 particular defendant because the guidelines range is too high
19 or too low to accomplish the purposes set forth in 3553(a).
20 If the district court concludes that the sentence produced in
21 part by these relevant conduct enhancements fails to properly
22 reflect 3553(a) considerations," they cite *Rita*, "the judge
23 may impose a lower sentence, including, if reasonable, a lower
24 sentence that effectively negates the acquitted conduct
25 enhancement."

1 It says, "A district court that enhances a sentence
2 based on acquitted conduct in fulfilling his duty to
3 adequately explain the chosen sentence to promote the
4 perception of fair sentencing should articulate how and why in
5 his judgment such conduct appropriately influenced his 3553(a)
6 analysis with respect to the specific defendant and the
7 specific crime at issue."

8 I'm leaning towards the Perez incident, so even
9 though you calculated my guidelines at a level 43, case law
10 claims that you can disregard the guidelines and still give me
11 whatever sentence you think is sufficient but not greater than
12 necessary under 3553(a).

13 And considering that I've been gone a long time,
14 considering that I have no plans on even going back to Aurora.
15 As a matter of fact, I had a lot of hope, you know, like when
16 I came in here about, like, certain findings you would make.
17 I'm always confident in the things I do, so I looked up on the
18 bright side, you know, hoping everything will go my way. But
19 'cause, you know, in my memorandum, I asked for time served
20 because -- but that was pretty much based on my calculation of
21 the guidelines, and the time I have in is like 81 months, so
22 it fulfills, like, assuming I would catch my good time, like a
23 95-month sentence.

24 So, like I say, if you were to give me ten years, it
25 would be, like, to account for my time in the state, it would

1 be like a 25-month sentence, 26-month sentence, and I'd be out
2 like in, I don't know, like two years, two-and-a-half years,
3 before I'm 30.

4 THE COURT: I think you need to stop, Mr. Susinka.

5 DEFENDANT SUSINKA: Think so? All right. Well, I
6 was just going to say one more thing, please.

7 If -- I doubt it, but I'm going to say it anyways --
8 if you choose to release me, say you give me time considered
9 today, right, as a sufficient -- if you look at me right now
10 and you seriously think that I'm going to go home and try to
11 gangbang, right, so that would be your basic reason because
12 you would think that I'm not rehabilitated or you think I'm
13 some career criminal or whatever you might think, I don't
14 know.

15 But, say, if you do think that I was rehabilitated
16 and that I have a strong potential to go home and make a man
17 of myself in a legitimate way, that if you were going to
18 release me, like, not to release me to the street but
19 discharge me to a halfway house or that once I get discharged
20 from my state, discharge me to a halfway house so that at
21 least I can be in a halfway house. I'll get on my feet from
22 the halfway house. Then I can take the money, I mean I'll
23 probably still be in this district, but I won't be in Aurora.
24 So I could find me somewhere to live, organize my life and
25 everything while sitting at the halfway house.

1 But that was if you choose to discharge me. But
2 that's it. But I think that 20 years is way more than
3 sufficient to serve the purposes of sentencing on 3553(a),
4 which is more relevant than the guidelines.

5 I guess that's it. That concludes my allocution.
6 Thank you.

7 THE COURT: You're welcome.

8 DEFENDANT SUSINKA: Oh, excuse me, excuse me, excuse
9 me. I forgot.

10 I want to apologize to my family. I forgot. I know,
11 like, they see me like they raised me, so they probably had,
12 like, high hopes about what I could become, and I failed. So
13 I apologize.

14 I apologize to my mother for stressing her out,
15 apologize to my father for stressing, for making -- for making
16 them stressed, and then I apologize to myself because I failed
17 myself. I lost myself and my sense of self, but -- and then
18 thank you, I mean, for letting me speak. I appreciate it now
19 and in the past. That's it.

20 Thank you.

21 THE COURT: Well, Mr. Susinka, it pains me to
22 sentence you, but I need to do what I need to do. And it
23 pains me because you are bright. You have a lot of potential,
24 and I just wonder about you. Ultimately, I wonder what it is
25 that you learned during this trial.

1 I mean I hope that you learned a great deal by
2 sitting through the trial. I hope somewhere in there that you
3 learned that you were used in this case, and you were used by
4 being asked to be a member of a gang, by agreeing to be a
5 member of a gang, by going on missions as you did in this
6 case.

7 There's no doubt in my mind that you drove your
8 mother's van and that you drove Mr. Crowder to a site and that
9 you knew he was likely to shoot somebody, and you knew what
10 that was all about because on the one hand, you can't be as
11 bright as you are here and make the arguments you are and yet
12 somehow claim that out on the streets, you were just this dumb
13 guy who managed to get different cars and managed to be in the
14 wrong places at the wrong time too often with loaded weapons
15 on you, way too often.

16 I think you need to, in the first instance, look in
17 the mirror, accept responsibility for all that you've done,
18 which I'm not sure that you have. You're so clever that I
19 think you fool yourself sometimes into blaming your
20 environment.

21 There's a lot of people that have grown up poor.
22 There's a lot of people that don't like the whole thing of
23 working and getting a paycheck every week, as you admitted
24 even here today you looked down your nose at.

25 Those are good people, hard working people, people

1 like your parents who you've clearly frustrated. Stressed out
2 is a light word. They tried to do their best for you. You
3 definitely let them down, let yourself down.

4 But what is troublesome to me is that I conclude that
5 while there's no evidence that you pulled the trigger, you
6 certainly put other people in a position to kill other
7 individuals. So what do we say to somebody like Steven Perez
8 who is shot and dead? What do we say to David Morales? What
9 do we say to Mr. Lazcano, who was the wrong person killed?
10 What do we say to Mr. Urbell Valdez?

11 Or do you not care about that? Because if you don't
12 care about that, then you're going to learn nothing. And that
13 would worry me if you've learned nothing after all of this.

14 As a result of an election, our country's made a
15 choice today. A new president has been sworn in. I bring
16 this up because today you have to make a choice. Are you
17 going to accept the sentence that I'm going to impose and then
18 go back as a man of your word and go back, rehabilitate
19 yourself through the federal prison system.

20 I think the idea that you could sit through the same
21 trial that I did and somehow think that you're either going to
22 get time served or be out before your 30th birthday is an idea
23 that is fanciful and wishful thinking. There's no way that
24 you could be part of the Insane Deuces, as I conclude that you
25 were, and not get a 20-year sentence because the sentencing

1 guideline range is life. The statutory max is 20 years.

2 I will sentence you to 20 years in the custody of the
3 Attorney General, which I think is the only fair sentence that
4 will not deprecate the fact that certain individuals are in
5 wheelchairs, shot up or dead as a result of your gang
6 activity.

7 Where I will use my discretion to your benefit is I
8 will make this sentence concurrent with the state sentence,
9 which is to your great benefit, which is something the
10 government doesn't want me to do.

11 I do that because I do think your rehabilitation
12 potential, if I take you at your word, is great. I do think
13 that you made some efforts prior to this federal indictment to
14 change your life around, but you need to desperately make this
15 your last conviction.

16 If you don't, it is my prediction, Mr. Susinka, that
17 the next sentence that you receive either in the state system
18 or in the federal system will be the last sentence that you
19 receive because it will be like the sentence that I just
20 imposed on Mr. Benabe, which will be a life sentence. Or, to
21 the contrary, the next time that you are shot, Mr. Susinka, it
22 will be the end of your life.

23 So you need to make that decision over the next few
24 years; but for today, I will sentence you to 20 years in the
25 custody of the Bureau of Prisons, put you on five years of my

1 supervised release, use my discretion to make your sentence to
2 be served concurrent with your current state sentence.

3 I'm going to impose a fine of \$2,500 which will be
4 paid from funds that you will generate by working in prison,
5 and assess you \$100.

6 You have a right to appeal both the sentence and
7 conviction by filing a notice of appeal within ten days. If
8 you need court-appointed counsel, you can request one from the
9 Court of Appeals.

10 Mr. Rimland or Mr. Wagner, do you want me to
11 recommend any particular facility?

12 MR. RIMLAND: In terms of a particular institution,
13 your Honor, no; but in terms of someplace that would be
14 conveniently located so that his family can visit with him
15 would be great.

16 THE COURT: Okay. I will recommend the most
17 appropriate facility be designated closest to the Chicago
18 metropolitan area.

19 Is there anything else we need to cover on behalf of
20 the government?

21 MR. POPE: Yes, your Honor.

22 At this point we'd move to dismiss Count 9 of the
23 indictment as to this defendant.

24 THE COURT: Count 9 will be dismissed with prejudice.

25 Anything else on behalf of the defense?

1 MR. RIMLAND: Not at this time.

2 MR. WAGNER: No, sir.

3 THE COURT: Good luck to you, Mr. Susinka.

4 MR. WAGNER: Thank you.

5 THE COURT: We'll stand in recess.

6 (Which were all the proceedings heard.)

7 CERTIFICATE

8 I certify that the foregoing is a correct transcript from
9 the record of proceedings in the above-entitled matter.

10 /s/*Kathleen M. Fennell* *March 2, 2009*

11 _____
12 Kathleen M. Fennell
Official Court Reporter

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